

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CHARLES R. HOWELL

APPELLANT,

v.

STATE OF MISSOURI

RESPONDENT.

**DOCKET NUMBER WD71772
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: January 24, 2012

Appeal From:

Cass County Circuit Court
The Honorable Jacqueline Annette Cook, Judge

Appellate Judges:

Division Three: James E. Welsh, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

Attorneys:

S. Kate Webber, Kansas City, MO, for **appellant**.

Timothy Blackwell and Shaun J. Mackelprang, Jefferson City, MO, for **respondent**.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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No. WD71772

Cass County

Before Division Three: James E. Welsh, P.J., James M. Smart, Jr., and Joseph M. Ellis, JJ.

Charles Howell was convicted of one count of first-degree robbery and one count of armed criminal action following a jury trial. This court affirmed his convictions and sentences in a *per curiam* order in *State v. Howell*, 203 S.W.3d 801 (Mo. App. 2006). Howell filed a *pro se* Rule 29.15 motion for post-conviction relief and appointed counsel filed an amended motion, claiming ineffective assistance of appellate counsel. After an evidentiary hearing, the motion court denied Howell's post-conviction motion.

On appeal, Howell contends that the motion court erred in denying his motion for post-conviction relief in violation of his due process rights, his right to effective assistance of counsel, and to be represented by counsel of his choice. Howell argues that his appellate counsel was ineffective for failing to challenge the trial court's denial of his request for a continuance in order to be represented by private counsel of his own choosing. Howell further argues that appellate counsel was ineffective for failing to challenge the trial court's denial of his appointed counsel's request to withdraw from the case.

AFFIRMED.

Division Three holds:

The motion court did not clearly err in determining that appellate counsel was not ineffective based on Howell's claim that appellate counsel should have challenged the trial court's denial of his request for a continuance in order to be represented by private counsel of his choice. The trial court's denial of a request for a continuance to allow a defendant to obtain different counsel is highly discretionary. Here, the trial court was not required to grant a continuance in order to allow Howell to substitute appointed counsel for private counsel of his own choosing on the eve of the trial because: 1) Howell had been continuously represented by appointed counsel since his arraignment; 2) his appointed counsel indicated on the eve of the trial that she was not asking for a continuance; 3) there was no entry of appearance filed by another attorney prior to the commencement of the trial; 4) the trial court had already granted two previous continuances and rescheduled the trial pursuant to requests by the defense; 6) any last-minute substitution of counsel would inevitably have delayed the trial and impeded the efficient administration of

justice; 7) the witnesses and jury were assembled on the day of the trial and both attorneys indicated that they were prepared to proceed to trial; and 8) the trial court made a reasonable determination to proceed with the trial on the scheduled date. Appellate counsel was not ineffective for failing to challenge this claim on direct appeal because Howell failed to overcome the strong presumption that counsel was competent. Furthermore, counsel made a strategic decision to “winnow out the weaker arguments” and raise only those claims which counsel determined, based on his reasonable and professional belief, would be more likely to prevail on appeal. Howell also failed to demonstrate that the outcome of the appeal would have been different had this claim of error been asserted.

The motion court did not clearly err in concluding that appellate counsel was not ineffective for failing to challenge the trial court’s denial of appointed counsel’s request to withdraw from the case on the eve of the trial. The ultimate determination as to whether appointed counsel should have been allowed to withdraw from the case was within the sound discretion of the trial court. The trial court did not abuse its discretion in denying defense counsel’s request to withdraw from representing Howell on the eve of the trial, or on the morning of the trial. Appellate counsel could not be deemed ineffective for failing to raise a non-meritorious claim. Howell failed to show that there was any reasonable probability that the outcome of the appeal would have been different had this claim of error been raised by appellate counsel.

Opinion by James M. Smart, Jr., Judge

January 24, 2012

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